thorities is to leave the question of the alleged negligent use to the jury. Thus, in *Webster* v. *Symes*, 109 Mich. 1, in an action for causing the destruction of plaintiff's premises by negligently permitting sparks to escape from the smoke-stack of defendant's mill on a violently windy day, defendant's witness stated that, on said day, the circular doors in the fire-box were partly open, and there was other evidence that the drafts were open part of the time, and that cinders were emitted from the stack. Defendant testified that sparks could not have escaped with the drafts closed. *Held*, that there was sufficient evidence to authorize the submission to the jury of the isssue as to whether the drafts were open. See also *Needham* v. *King*, 95 Mich. 303.

In *Richards* v. *Schleusener*, 41 Minn. 99, defendant set a fire on his land to protect his haystacks, but it appeared that almost immediately after the fire was started it got beyond control; that there was a wind blowing, and the grass and stubble were very dry. *Held*, that the question of defendant's negligence should have gone to the jury.

In *McCully* v. *Clarke*, 40 Pa. (4 Wright) 399, in an action against defendants for negligence in not extinguishing a pile of coal which had taken fire, whereby the warehouse of the plaintiff adjoining, with its contents, was burned, *held*, that the proper subject of inquiry is whether the defendants had used such diligence as prudent and reasonable men would have exercised, and it is a question for the jury.

COLIN V. WELLFORD.*

Supreme Court of Appeals: At Richmond.

March 17, 1904.

1. BUILDING ASSOCIATION—*Insolvency—Rights of withdrawing members—Compromise.*—A withdrawing member of a building association which was in fact insolvent at the time the notice of withdrawal was given, though the insolvency was not notorious and no steps had been taken to wind up its affairs, is not a creditor and is only entitled to his *pro rata* share of the assets along with the other stockholders of the association, and it is immaterial that he has compromised with the officers of the association, and taken its notes for a less sum than would be the withdrawal value of his stock if the association were a going concern. When insolvency exists as a fact the right of the stockholders to equality in the distribution of the assets of the association attaches, and cannot be defeated by a notice of withdrawal, nor by any dealing between the member and the officers of the association which falls short of actual payment. "Insolvency," as here used, means inability of the association to satisfy the demands of its own members.

Appeal from a decree of the Chancery Court of the City of Richmond pronounced in a suit in chancery therein pending under the

* Reported by M. P. Burks, State Reporter.

style of *Wellford for etc.* v. *United Banking and Trust Co.*, in which the appellant was, on his petition, admitted as a party complainant, and the object of which was to wind up the affairs of the defendant company, which was charged to be unable to pay its stockholders in full. *Affirmed.*

The opinion states the case.

Legh R. Page, for the appellant.

B. Rand. Wellford, for the appellee.

KEITH, P., delivered the opinion of the court.

The record in this case discloses the following state of facts: The appellant was the owner of certain certificates of installment and prepaid stock in the United Banking and Trust Company, and, in the exercise of his right under the charter and by-laws of the company, on the 25th of January, 1901, he gave written notice of the withdrawal of his certificates of stock, which notice was duly served on the company, and accepted by it as sufficient and regular in every respect. On the 28th of March, 1891, 60 days (the period required under the by-laws) having expired, he made demand upon the company for the sum due him, and was promised payment at an early day. The promise was not kept. He was put off from time to time, and on or about the 22d of May, 1901, was informed that the board of directors rejected his demand for the payment of his claim in full, and offered $4,605.75 in compromise and settlement, to be paid in thirteen monthly installments, bearing interest at the rate of three *per cent. per annum.* This proportion was accepted by appellant, and upon the receipt of the obligations of the company, as provided by the settlement, he surrendered his certificates of stock, which were marked "cancelled and withdrawn," and appellant's name was stricken from the books of the company as a shareholder. The first of the thirteen monthly installments was paid at maturity, but before the second became due a bill was filed to wind up the affairs of the company, and on the same day receivers were appointed, who refused further payment to appellant.

In July, 1902, appellant filed his petition, asking to be placed upon the footing of a creditor of the company for the amount of

the twelve matured and unpaid obligations above referred to, and the matter was referred to a commissioner, who reported adversely to appellant's claim. The exceptions to that report were overruled by the court, a decree was entered denying the prayer of petitioner, and the case is before us for review.

The report of the commissioner proceeds upon the theory that the company was insolvent at the date of the notice of withdrawal, and the opinion of the learned chancellor is to the same effect. There is a strong presumption in favor of the correctness of this finding of fact on the part of the commissioner, thus approved by the court, and there is nothing in the record to lead us to a contrary conclusion. We shall therefore proceed with the consideration of the case, taking the insolvency of the company, at least as early as January, 1901, as a fact established. The term "insolvency," as here used, has no reference to outside creditors, for there are none, but to the inability of the company to satisfy the demands of its own members.

We have had no adjudication in this state upon the precise question here involved.

In *Andrews* v. *Building Association,* 98 Va. 445, 36 S. E. 531, 49 L. R. A. 659, we held that a withdrawing member of a building association does not lose all of his rights and interests as such in the association. Though he is not, strictly speaking, a creditor of the association, he can maintain no suit to recover the withdrawal value of his stock until a fund for its payment has been provided, and until then the act of limitation does not begin to run against his demand. On the other hand, it is the duty of the association to provide such a fund, in accordance with its charter and by-laws, and in default thereof the member may ask the appointment of a receiver, and, it may be, a winding up of the affairs of the association.

In *Eastern Buiding & Loan Ass'n* v. *Snyder,* 98 Va. 710, 37 S. E. 298, it was held that a solvent building association, in the absence of bad faith on its part, is not in default, and cannot be sued by a withdrawing member, until there are funds in the treasury of the association out of which he is entitled to be paid.

We are in this case called upon to define the rights of a withdrawing member of a building association which was insolvent at the time notice of withdrawal was given, though no legal steps had

been taken to wind up its affairs, and whose insolvency, though in fact existing, was not then notorious.

As shown in *Andrews* v. *Building Association, supra,* the tendency of the English courts, while recognizing that withdrawing members are not creditors of the association in the ordinary sense of the word, has been to allow them a preference over those who have given no withdrawal notice. *Sibun* v. *Pearce,* L. R. 44 Ch. Div. 354.

It was held, however, in *Re Sunderland,* Queen's Bench Div., 24 L. R. 394, that the rule of the company provided only for withdrawal from the societies while they were or were believed to be solvent, and that, therefore, notices of withdrawal which were given or which matured at a time when the societies were known to be insolvent, though before the actual date of the winding-up order in each case, did not entitle the shareholders who had given them to be paid the amount of their subscriptions in priority to other shareholders in the winding-up.

The strong preponderance of the authorities in this country, where insolvency exists, seems to be in accord with the decision of the Supreme Court of Pennsylvania in *Christian's Appeal,* 102 Pa. 184. The court said: "While, in a qualified sense, withdrawing stockholders may be considered creditors of the association, their rights, as against those with whom they have been associated, are very different from those of general creditors, whose claims are based wholly on outside transactions. If the association has been prosperous, they have a right, under certain limitations and restrictions, to demand and receive their proportionate share of the accumulated fund; but if bad investments have been made, or losses have been sustained, before actual withdrawal, they must bear their just proportion thereof. . . . But the right of withdrawal, and the extent to which it may be exercised, presupposes that at least a relative proportion of the assets will remain for the benefit of those who continue to be active members of the association.

"When a building association has failed to fulfill the object of its creation, and has become hopelessly insolvent, it cannot be justly or equitably wound up on any other principle than that above suggested. After expenses incident to the administration of its assets are deducted, the general creditors, if any, should be first paid in full, and the residue of the fund should be distributed *pro rata*

among those whose claims are based upon stock of the association, whether they have withdrawn, and hold orders for the withdrawal value thereof, or not. Both classes are equally meritorious, and in marshaling the assets neither is entitled to priority over the other. The claims of each are alike based upon their relation to the association as members thereof; . . . and while it may be true that a stockholder may recover judgment against the corporation, and thus become, in a certain sense, a creditor thereof, he is nevertheless not a creditor within the meaning of our assignment laws."

The doctrine of *Christian's Appeal* has been quite generally accepted by courts and text-writers. *Chapman* v. *Young,* 65 Ill. App. 131; *Gibson* v. *Safety Homestead Ass'n,* 170 Ill. 46, 48 N. E. 580, 39 L. R. A. 202; *Heinbokel* v. *National Savings Ass'n,* 58 Minn. 340, 59 N. W. 1050, 25 L. R. A. 215, 49 Am. St. Rep. 519; *Hohenshell* v. *Loan Ass'n,* 140 Mo. 566, 41 S. W. 948; *Rabbitt* v. *Wilcoxen,* 103 Iowa, 35, 72 N. W. 306, 38 L. R. A. 183, 64 Am. St. Rep. 152.

The text-writers are of a like opinion.

Endlich on Building Associations (2d Ed.) sec. 108, says:

"The right of withdrawal, however, exists and may be exercised only while the association is a going concern, or the series to which the stock belongs running. It cannot be exercised when the stock has reached par, and the association or series exists only for the purpose of liquidation. Nor, as has been settled in England, can it be exercised where the association is, at the time, known to be insolvent. The provisions for withdrawal are not intended to apply to the latter, any more than to the former case. 'It would be altogether unreasonable to suppose that it was intended, in the event of insolvency, to permit one set of members to escape from liability at the expense of the others. . . . The rule (as to withdrawals) seems . . . not to contemplate any such contingency as a suspension of its business, and therefore only to provide for a withdrawal from the society while it was, or was believed to be, still solvent.' That this doctrine is correct, as far as it goes, is self-evident. But there is no reason why it should not go a step further by omitting the qualification introduced by reference to the notoriety of the fact of insolvency. Apart from the consideration that one who knows the association to be insolvent is guilty

of bad faith towards his fellow members when he attempts to get himself paid at their cost, there is every bit as much reason why an actual state of insolvency, though unknown at the date of the giving of a withdrawal notice, should prevent it from becoming effectual. The payment of the claims in the one case, as in the other, would give an unfair advantage to the withdrawing, and entail an undue injury upon the remaining, members. Accordingly, it has been decided in Pennsylvania that the fact of insolvency of an association negatives the right of any one to obtain a priority over his fellows by giving notice of withdrawal. 'The right of withdrawal presupposes that at least a relative proportion of the assets will remain for the benefit of those who continue to be active members of the association.' Whilst, therefore, it has been held that members who had given notice to withdraw, and whose notices had matured before the society's insolvency was manifest or declared, were entitled to stand upon their rights as withdrawing members, even to the detriment of those who had not withdrawn or whose notices had not matured, the better and more logical doctrine would seem to be that the existence of a state of insolvency at the time of the giving of the withdrawal notice, ascertained at any time before actual payment of the claim, renders the notice abortive, and destroys the right to withdraw, or to claim any benefit under the notice already given. This principle does not, of course, invalidate settlements already made in good faith with withdrawing members who have been paid out, nor subject the right of withdrawing members to claim payment, in accordance with the provisions relating to withdrawals, to jeopardy by reason of causes of insolvency arising after notice of withdrawal." Thompson on Building Associations (2d Ed.) p. 289.

It seems, indeed, to be the accepted American doctrine that, when an association is in fact insolvent, a withdrawing member has only the right to a *pro rata* share in the distribution of its assets. Nor is the situation affected by any assurance given by the officers of the association to the withdrawing member as to the solvency of the society at the date of the notice. The authorities cited establish the principle that, when insolvency exists as a fact, the right of the shareholders to equality in the distribution of the assets attaches, and constitutes a paramount equity in their favor. The fact of insolvency being established, and the right to equality of

distribution having attached, it cannot be defeated by a notice of withdrawal upon the part of a member, nor by any dealing between him and the officers of the association which falls short of actual payment.

In *Rickert* v. *Suddard,* 80 Ill. App. 204, it was held that "where a member gives notice of his withdrawal, and is paid by a check upon the funds of the association in bank, but before such check is presented for payment the funds of the association are withdrawn and the association itself becomes insolvent, the rights of the holder of the check are to be determined by the solvency of the association at the time that the check was given," and that the insolvency of the association was a question of fact to be determined in the same way as similar questions of fact arising in other causes.

In the *Columbus Building Association* v. *Kriete,* 192 Ill. 128, 61 N. E. 510, the withdrawing stockholder had reduced his claim to a judgment, but the court held that this gave him no priority over other stockholders.

Appellant had perfected his notice to withdraw, and, if the association could be treated as a going concern, he should have been paid the full withdrawal value of his certificates. The association declining to pay him in full, he suffered an abatement, and now claims to be entitled to relief by virtue of a compromise entered into between him and his debtor. The principle of equality, as established by the authorities cited, would in any event be fatal to this contention. The principle of equality which defeats the appellant, were he standing alone upon his notice of withdrawal, is sufficient to repel the equity which he asserts, and sufficient to defeat his right to recover by virtue of his co-called compromise, for it strikes at the root of the power of the officers of an insolvent association to create any preference among stockholders in the distribution of its assets. A view of the case may well be taken in which the willingness to compromise may be construed as tending to impair rather than strengthen the position of appellant. The knowledge that there were many other stockholders in like case with himself who had, in advance of action upon his part, given notice of withdrawal, and whose demands had not been satisfied; the fact that there was no money in the treasury of the association which could properly be appropriated in payment of withdrawal claims, and that he was ready to accept in satisfaction of his

demand a material abatement of its amount, not to be paid in cash, but in promises to pay in installments distributed over a period of thirteen months, is persuasive that appellant was aware of the financial condition of the association. As was well said by the learned chancellor in his opinion: "It must have been manifest to Colin, in taking the notes, that there were no funds on hand properly applicable to the discharge of his claim, for the by-laws [of the association], with which Colin must be presumed to have been acquainted, plainly contemplated that these withdrawals should be settled by cash payments made out of funds already in hand, derived from fixed sources, and would not be settled by notes. The very manner in which the notes were made out called attention to the irregularity of the settlement. Colin has obtained an apparent advantage which the principle of mutuality applicable to the distribution of the assets of an insolvent company of this kind do not permit him to hold. These associations partake of the nature of partnerships, and no member can take any advantage over his fellows not clearly legal. The settlement made is not so far executed as to be beyond recall, and Colin can be remitted to his position as stockholder without any injustice to him."

We are of opinion that the decree appealed from should be affirmed. *Affirmed.*

EDITORIAL NOTE.—A unique feature of this case is that the same leading authorities are cited and relied upon in the briefs for both sides. This would indicate that at least the question is one of nice construction. The precise point has not heretofore been passed upon in this state. Manifestly, the dominant element was the insolvency of the company, for "if," says the court, "the association could have been treated as a going concern, appellant should have been paid the full withdrawal value of his certificates." Note, too, the distinction in the meaning of the word "insolvency," to which the court calls attention—that, as used in this case, "it has no reference to outside creditors, for there are none, but to the inability of the company to satisfy the demands of its own members."

Counsel for appellant urged strongly that the company was estopped from asserting a plea of *ultra vires* as a defense to the contract, first, because of its long established course of conduct, and, second, because the contract had been wholly performed. Citing *Goggin* v. *Kelly* (Tex.), 25 S. W. 1135; Endlich on Building Associations, section 82. He further claimed that the familiar principles of accord and satisfaction should be applied, and that the undisputed agreement should be decreed to be satisfied according to its terms. Citing Thompson on Building Associations, page 285; *Henninghauser and Wolf, Receivers,* v. *Fisher,* 50 Md. 583; *Solomons* v. *American Building and Loan Association,* 116 Fed. 676. The court, however, inferentially negatives the first contention, and in effect over-

rules, though not in terms, the second, by invoking as the controlling consideration the principle of equality of recovery among the stockholders, who in this respect, it says, are partners and nothing else. To this it was replied that the analogy is not demonstrative, inasmuch as it is not incompetent for one of two or more members of a partnership, especially where, as here, there are no general creditors, to withdraw with the consent of the others, receiving from them a certain amount in full accord and satisfaction, which settlement they would not later be allowed to open. The contention, however, did not prevail.

JOHNSON V. COMMONWEALTH.*

Supreme Court of Appeals: At Richmond.

March 17, 1904.

1. CRIMINAL LAW—*Indictment—Defective count—Demurrer—Verdict on other counts.*—Improperly overruling a demurrer to one count of an indictment is no ground for setting aside a verdict of guilty on other counts.

2. CRIMINAL LAW—*Verdict of guilty on some counts and silent as to others.*—A verdict of guilty as to certain counts of an indictment and which is silent as to other counts operates as an acquittal as to the latter, and it is unnecessary to enter any judgment of acquittal thereon.

3. FORGERY AND UTTERING—*One indictment—Separate counts—Separate verdicts.*—Forging and uttering a forged paper, knowing it to be forged, are separate and distinct offences, and may be charged in separate counts in the same indictment, and the jury may find a separate verdict of guilty upon each count, and fix the punishment for each offence separately, but the usual and better practice in such cases is to find a general verdict for the two cognate offences charged.

4. EVIDENCE—*Comparison of writing—Writings admitted merely for sake of comparison—Enlarged photographs.*—On an indictment for forgery it is not error to admit in evidence other writings of the prisoner shown to be genuine, and of the person whose writing is alleged to have been forged, also shown to be genuine, for the purpose of comparing by expert testimony the genuine handwritings with the handwriting of the paper alleged to have been forged. Nor is it error to admit in evidence enlarged photographs of these genuine writings for the purpose of facilitating comparison.

5. TRIAL—*What papers jury may take.*—Papers used in evidence before a jury may be carried from the bar by the jury under the express provisions of section 3388 of the Code.

6. INSTRUCTIONS—*Evidence to support.*—It is not error to refuse an instruction when there is no evidence tending to sustain the theory propounded by it.

7. CRIMINAL LAW—*Keeping jury together—When necessary.*—Where two separate

* Reported by M. P. Burks, State Reporter.